Supreme Court, U. S.
FILED
AUG 22 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

BRIEF OF APPELLEE

A. F. SUMMER
Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
P. O. Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Questions Presented 1

Statement of the Case 2

Argument 8

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extra-territorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce 8

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed From, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies 22

Conclusion 28

Table of Authorities

Cases

Bailey v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962) 26

Baldwin v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934) 13, 20

Dean Milk Company v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) 13, 14, 19, 20

Dixie Dairy Co. v. *City of Chicago*, 366 F.Supp. 1351 (N.D. Ill., 1973) 16
Florida Lime and Avocado Growers, Inc. v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963) 10
Frasier v. *Board of Trustees of University of North Carolina*, (D.C. N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956) 27
Golden v. *Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969) 26
Great Atlantic & Pacific Tea Co. of La. v. *Cottrell*, 383 F.Supp. 569 (S.D. Miss., 1974) 2, 6, 7, 12, 24
Gulf Oil Corp. v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974) 12
H. P. Hood & Sons v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948) 10
Huron Cement Co. v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960) 19
Lawton v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894) 16
Milk Control Board v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752 20
Mintz v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933) 21
Moody v. *Flowers*, 387 U.S. 97, 87 S.Ct. 1544, 18 L.Ed. 2d 643 (1967) 24-25, 27
Parker v. *Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) 17
Perez v. *Ledesma*, 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971) 28
Phillips v. *United States*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941) 27

Polar Ice Cream & Creameries Co. v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964) 14, 15
Public Service Commission v. *Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952) 26
Rockefeller v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970) 27
South Carolina Highway Department v. *Barnwell*, 303 U.S. 177, 58 S.Ct. 510, 83 L.Ed. 1124 (1938) 17
Southern Pacific Company v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945) 17, 18
United Public Workers of America v. *Mitchum*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947) 26
United States v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943) 10

CONSTITUTIONAL PROVISIONS, REGULATIONS AND STATUTES

Article I, §8, Clause 5, Constitution of the United States 2
Regulations Governing the Production and Sale of Milk and Milk Products, Section 11 .....2-4, 6, 8-12, 14-29
28 USC 1253 .....1-2, 22, 24, 25, 26, 28, 29
28 USC 2281 .....23, 25

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1148

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,
Appellant,

vs.

HUGH B. COTTRELL, M. D., HEALTH OFFICER, STATE OF MISSISSIPPI,
Appellee.

BRIEF OF APPELLEE

QUESTIONS PRESENTED

Whether a state may in conformity with the Commerce Clause of the United States Constitution coercively require reciprocity of inspection standards and results in preference to out-of-state inspection, or excise taxes to defray the cost of such inspection, where such policy promotes and was found to promote free trade.

Whether a processor denied access by the reciprocal requirement, may bring to this Court under 28 USC

§1253, a claim that equal protection was violated as to certain dairies grandfathered in if the grandfather regulations were not specifically attacked, no injunction restraining the enforcement of any state statute was requested in connection with the grandfather clause claim and Appellant A & P did not stand to benefit by any prohibitory injunction against the grandfather clause regulation.

STATEMENT OF THE CASE

On October 25, 1972, the appellant Great Atlantic & Pacific Tea Company, Inc. [hereafter A & P], filed this suit to invalidate §11 of the milk regulations of the Mississippi State Board of Health. That regulation requires that Mississippi health authorities accept the substantial equivalency of Louisiana's milk regulations and Louisiana's milk ratings of 90 percent or more if Louisiana will reciprocate as to Mississippi's milk in these same two undertakings. Mississippi has accepted Louisiana's regulations and ratings with respect to appellant A & P. Louisiana declines to reciprocate. Under the regulation Louisiana processed milk is then barred from Mississippi.

A & P alleges that Mississippi's requirement that Louisiana reciprocate in its ratings and standards of inspection for out-of-state processed milk infringes Article I, §8, Clause 5, of the Constitution of the United States. After hearing and the submission of extensive stipulations of fact, the Three Judge Court held that the challenged section of Mississippi's regulations was a warranted exercise of Mississippi's police power free from any constitutional infirmity. *Great Atlantic & Pacific Tea Co. of La.* v. *Cottrell*, 383 F.Supp. 569, Three Judge Court (S.D. Miss., 1974).

The District Court concluded that Mississippi's triple-edged requirements of (1) milk production and processing under substantially equivalent regulations by a sister state; (2) a milk rating of 90 percent or above according to U. S. Public Health Service standards; and (3) reciprocity of inspection ratings and inspection standards between sending and receiving states, were constitutional. The Court reasoned that the incidental or indirect burden upon commerce was overborne by specific proof that the application of Mississippi's regulation was free trade in design and effect. Sixteen dairies from nine states export milk to Mississippi under reciprocal agreements. The mutual exchange of inspection results and standards of inspection between sister states under §11 actually facilitates commerce in milk.

The Court found that Mississippi's policies had demonstrably opened free milk trade, lowered trade restrictions, and insured the enforcement of minimum health standards for milk originating out of state. The reciprocity created by §11 was viewed by the District Court as a reasonably nondiscriminatory alternative to on-site inspections of milk processing facilities outside the police jurisdiction of Mississippi or an excise tax on processors to defray the cost of these inspections. Accordingly, the complaint was dismissed on the merits. This appeal ensued.

In 1969 the Great A & P Tea Company of Louisiana leased from Dairymen, Inc., a dairy processing facility in Kentwood, Louisiana. That facility produces all the milk at issue in this case. According to the affidavit of Wade Buff, the Kentwood facility presently produces 2,903,000 gallons of milk ultimately sold within the State of Louisiana. The permit was sought for the excess capacity of approximately 750,000 gallons per year. After the plant was

acquired no production was had during 1970, nor during the first two calendar quarters of 1971. Serious production was begun in the Kentwood facility in 1972. [Exhibit G, pp. 2-4, *Original Stipulation*]

On August 28, 1972, three years after acquisition of the Kentwood facility, A & P sought a permit to distribute its Kentwood products in the State of Mississippi. [*Original Stipulation*, Exhibit IV] A & P failed to forward the requested reciprocal agreement certifying that Louisiana would accept the validity of Mississippi's inspections. Apparently A & P viewed the statement of Louisiana's Chief Health Officer that Louisiana had not entered reciprocity agreements with any states as a circumstance rendering compliance impossible. Thereafter A & P treated the September 18, 1972, letter from the Supervisor of Mississippi's Milk Control Program as a final denial and thereafter entered suit. [*Original Stipulation*, Exhibits II, V]

§11 is Mississippi's answer to the interruption in trade that results when states like Louisiana bar out-of-state processed milk. It is against the backdrop of the regulations applicable to domestic producers that §11 is best understood. Without §11, each state's different and exacting standards come into play. Because of milk's unique nutritional importance and susceptibility to contamination, its processing and pasteurization are subject to extremely exacting standards. [See Exhibit H, Regulation Governing the Production and Sale of Milk Products, Mississippi State Board of Health, *Original Stipulation;* and Exhibit J, Milk and Milk Products Regulations, Chapter V, Sanitary Code of the State of Louisiana, Louisiana State Board of Health] A categorical comparison between the applicable Louisiana and Mississippi inspection standards yields the following result:

Items	Louisiana	Mississippi	Interpretation
Imported Milk	May accept certification of inspection and supervision from other governmental agencies	Certification of reciprocity of inspection and supervision of sanitation and 90% or above sanitation compliance	Mississippi is equal to or exceeds Louisiana's requirements
Frequency of Tuberculosis Tests of Dairy Cattle	Six years	Three years	Mississippi exceeds
Lighting and Ventilation in Barns	Ten percent of floor area in windows	Eight square feet per stanchion	Mississippi exceeds
Lighting and Ventilation in Milk House	Ten percent of floor area in windows	Fifteen percent of floor area in windows	Mississippi exceeds
Pasteurized Milk Delivery Temperature	50° F.	45° F.	Mississippi exceeds
Frequency of Dairy & Plant Inspections	At least one per six months	At least four per six months	Mississippi exceeds
Abnormal Milk (Mastitis) Standard	No specific requirement shown in Louisiana Regulation	Maximum of 1,000,000 per ml. cell count per ml. of milk	Mississippi exceeds
Degrading or Permit Suspension for Violating Mastitis Tests	Three consecutive violations	Violation of three out of last five sample results	Mississippi exceeds
Frequency of Milk Sampling	None listed	At least four per six months	Mississippi exceeds

BEST COPY AVAILABLE

These line-by-line comparisons are drawn from Exhibits H and J, *Original Stipulation*. They reveal the basic differences between Louisiana's and Mississippi's domestic requirements. The District Court assumed, arguendo, that this chart was a true representation of the differences in health, production, and sanitation standards. *Great A & P Tea Co., Inc. v. Cottrell, supra,* p. 575. The authenticity of this tabulation is not challenged in appellant's jurisdictional statement.

In 1967 the Mississippi State Board of Health adopted §11 of the regulations. The adoption thereafter waived application of the cited standards for domestic producers, *supra,* to sister state producers in favor of reciprocal agreements. Under §11 the following dairies export milk into Mississippi under a reciprocal inspection agreement:

*ALABAMA	Dixie Dairies, Inc., Prichard, Alabama Barber Pure Milk Co., Mobile, Alabama
ARKANSAS	Dean Milk Co., Conway, Arkansas
FLORIDA	Reddi-Wip Co., Jacksonville, Florida
GEORGIA	Sealtest Foods, Atlanta, Georgia
KENTUCKY	General Dairy Service, Murray, Kentucky
*LOUISIANA	Borden Co., Franklinton, Louisiana Borden Co., New Orleans, Louisiana Sealtest Dairy Products, New Orleans, Louisiana Superbrand Dairy Products, New Orleans, Louisiana
MICHIGAN	Michigan Prod. Dairy Co., Sebewaing, Michigan
MISSOURI	Mid-America Dairymen, Inc., Lebanon, Missouri Sealtest Foods, St. Louis, Missouri

TENNESSEE	Dairymen, Inc., Nashville Div., Lewisburg, Tenn. Midwest Farms, Memphis, Tennessee Sealtest Foods, Memphis, Tennessee Dean Foods Co., Memphis, Tennessee Turner Dairies, Covington, Tennessee
WISCONSIN	Dean Foods Co., Janesville, Wisconsin Bancroft Dairy, Madison, Wisconsin

Louisiana's health authorities were not before the District Court because of the proscriptions of Rule 4, Federal Rules of Civil Procedure. At the conclusion of the hearing the District Court invited memoranda on the question of whether Louisiana officials could be joined. Both parties agreed that such a step was impossible and the Court so held. *Great A & P Tea Company* v. *Cottrell, supra,* p. 569. The Court properly recognized that "if the reciprocity clause could be said to be retaliatory in nature the guilty party is Louisiana not Mississippi." *Id.* at p. 576.

Revealing evidence of Louisiana's policy was contained in the letter of Dr. Ramson K. Vidrine, Louisiana's State Health Officer. [*Original Stipulation,* Exhibit II] As he articulated Louisiana's policy, that state refuses to accept milk which does not meet Louisiana standards:

> "At present we are not receiving out-of-state processed milk from Mississippi, a state of particular concern to you, because the milk does not meet our standards. . . . Again, we have no objection to importation of milk into Louisiana so long as it meets the same standards we require of intrastate producers and processors. Louisiana has not entered reciprocity agreements with any state." [*Original Stipulation,* Exhibit II]

Louisiana's policy, authoritatively articulated through Dr. Vidrine, is at war with the commerce clause. Moreover, there is no factual support for the proposition that Mississippi milk does not meet Louisiana's written standards. Dr. Vidrine has adopted the policy against reciprocal agreements despite a statutory policy in Louisiana favoring reciprocal agreements: "The State Health Officer may accept the certificate of inspection of a duly authorized government representative, agent, or agency of such other state wherein such products are produced." [Para. 5.B.1., Exhibit J, *Original Stipulation*, Chapter 5, Milk, Milk Products and Manufactured Milk Products Regulations, January 28, 1968, p. 6]

ARGUMENT

I. Reciprocity of Inspection Standards and Inspection Results As an Alternative to Extraterritorial Inspections or Excise Taxes on Producers Does Not Unconstitutionally Burden Interstate Commerce.

The regulation at issue here is plain and unequivocal:

"Milk and milk products from points beyond the limits of routine inspection of the state of Mississippi or its police jurisdiction, may be sold in the state of Mississippi or its police jurisdiction, provided they are produced, pasteurized, and labeled under regulations which are substantially equivalent to this Regulation and have been awarded an acceptable milk sanitation compliance rating of 90 percent or above made by a state milk sanitation rating officer certified by the U.S. Public Health Service, and Provided further, that the regulatory agency who has jurisdiction accepts

Grade A milk and milk products produced and processed in Mississippi on a reciprocal basis. . . ." (Regulations Governing the Production and Sale of Milk and Milk Products, Section 11)

The regulation does not say without more that Louisiana milk is barred from export to Mississippi unless Mississippi milk can enter Louisiana. Appellant maintains in its jurisdictional statement that Part One of the regulation respecting inspection standards is constitutional while reciprocity is not. [Brief of Appellant, p. 5] Of course, the regulation is not severable for two interrelated sets of reasons.

First, the health requirements of Part One and the reciprocity requirements of Part Two are inextricably bound up with each other. §11 covenants that Mississippi will do the inspections, will certify them, and will accept a standard below that applicable to domestic producers if the forwarding state will do the same. Second, Parts One and Two are not severable because severability would allow a lesser standard of health and sanitation for domestic producers than out-of-state producers. The commerce clause does not require that Mississippi affirmatively disadvantage domestic producers in a way which might offend the Equal Protection Clause of the Fourteenth Amendment. Finally, the appellant is incorrect when he says that A & P meets all the health related requirements of the Mississippi regulation. Absent reciprocity, which Louisiana stoutly refuses to grant, the substantial equivalency standard in the regulations is *exact compliance* with Mississippi's standards for domestic producers.

A & P's milk from the Kentwood plant is, therefore, not barred by its failure to meet the health requirements of Part One of §11, but by its failure to comply with stan-

dards for domestic processors set out at p. 5, *supra*. A & P evinces a misunderstanding of this when they represent that "A & P has complied with all health related requirements of the milk regulation, within the meaning of §11." Absent on-site inspections of the Kentwood plant, which have not taken place (Testimony of Clinton Van Devender, Transcript of Testimony on Motion for Preliminary Injunction, p. 6), and Louisiana's proven shortfall in its own regulations below that of Mississippi's, A & P's milk does not meet the health requirement. Because of the nonseverability of §11, A & P cannot have its milk judged according to the relaxed standards of §11. As to the domestic standards which for nonreciprocating states become "substantial equivalency", A & P did not allege or prove compliance with these standards and is, therefore, barred by them.

These Mississippi health and safety standards, *supra*, are valid and constitutional as apply to milk originating outside the police jurisdiction of Mississippi. These regulations would not be forbidden even though they might affect interstate commerce because they are rationally related to a state's legitimate objects of regulation. *United States* v. *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1943). States have wide latitude in their exercise of police power over facilities for handling milk. *H. P. Hood & Sons* v. *Dumond*, 336 U.S. 525, 69 S.Ct. 657, 93 L.Ed. 865 (1948). The pertinent Mississippi regulations are protective measures for the health, safety, and welfare of its citizens and may constitutionally be relied upon. *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

Louisiana's failure to execute a reciprocity agreement prevents any part of §11 from being applied to Louisiana processors. The health and reciprocity features of §11

plainly interface with each other. By its failure to enter into reciprocity, Louisiana is saying that it will not on a reciprocal basis accept the valiidty of Mississippi inspections and Mississippi ratings. There is a valid health related purpose in one state conceding that a sister state is making a believable and proper health inspection of milk. The overriding health related feature of §11 is the exchange of milk upon equivalent standards which are not necessarily chosen by each state but are a compromise.

That reciprocity and substantial equivalency of regulation go hand-in-hand is self-evident. The substantial equivalency standard of §11 insures both similar standards of inspection and, of equal importance, similar execution of the inspections. Thus the substantial equivalency standard goes to the entire milk inspection procedures and *practices* utilized by a sending state. If Louisiana will not give trust and reliance to Mississippi's conduct of the inspections, then Mississippi is loath to accept the same Louisiana procedures, out of a regard for the health and welfare of her own citizens.

There is testimony that as of the November 6, 1972, date of the hearing on motion for preliminary injunction Mississippi accepted the 90 percent rating and the substantial equivalency of Louisiana regulations. But §11 imposes a continuing dual health requirement that requires ongoing supervision and continuing vigilance. "(1) The milk must be produced, pasteurized, and labeled under regulations which are substantially equivalent to this regulation, and (2) have been awarded an acceptable milk sanitation compliance rating of 90 percent or above. . . ." Failure of Louisiana to reciprocate gives rise to apprehension that continued inquiry by Mississippi authorities into the substantial equivalency of Louisiana regulations would be justified. Further, substantial equivalency and a 90%

rating are not the same thing. This is true in a context where the substantial equivalency standard runs to the entire milk inspection procedures and practices utilized by a sending state. The decision to accept the substantial equivalency of Louisiana's procedures is a pure health consideration which is made easier and more palatable where the sending state will reciprocate.

The adoption of §11 was a generous waiver of Mississippi's strict inspection requirements to facilitate trade. The effect of the provision as found by the District Court has been to lower trade barriers and create an open market for milk in the State of Mississippi. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* pp. 575-576. These findings are certainly not clearly erroneous. As to the claim that there has been an actual interference with the whole flow of interstate commerce, it clearly fails for want of proof. As this Court recently remarked in a totally different context but to similar effect, "On the record in this case, however, the conclusion of the District Court that no such circumstances existed here cannot be considered erroneous." *Gulf Oil Corp.* v. *Copp Paving Co.*, ... U.S. ....., 95 S.Ct. ....., 42 L.Ed.2d 378 (1974).

Certainly the Mississippi regulation affects commerce and with respect to Louisiana processors affects it in a substantial way. But the effect on commerce is the inverse of what the appellant says. Manifestly, the effect of the regulation has been to open free and unfettered trade in milk. While appellant says the provision favors local processors and opens foreign markets for local businessmen (Jurisdictional Statement, p. 8), the true effect of the rule is to disadvantage local processors. In point of fact, §11 aids the free flow of milk, and to this the appellant A & P agrees:

> "Reciprocity, by eliminating hypertechnical standards peculiar to one state, may aid the flow of milk." Jurisdictional Statement, p. 9.

All the authorities relied on by the appellant are inapposite. They involve trade barriers enacted with a hostile eye toward out-of-state suppliers affirmatively disadvantaging them by price, area or quantity discrimination. In *Baldwin* v. *Seelig*, 294 U.S. 511, 55 S.Ct. 497, 79 L.Ed. 1032 (1934) a challenged New York law forbade the sale of out-of-state milk unless purchased at a price which would be lawful under New York regulations. The complaining distributor had purchased his milk out of state at less than New York's established minimum. New York's authorities offered the argument that New York prices were necessary to insure a reliable supply of healthful milk. This Court rejected the lame health argument, seeing the New York price system as insulating local producers from interstate competition—in effect "an unreasonable clog upon the mobility of commerce."

The New York regulations were "hostile in conception as well as burdensome in result." 294 U.S. at 527, 79 L.Ed. 1040. Significantly, the Court observed that the degree of interference with interstate commerce whether direct or indirect was irrelevant since the *purpose* and *tendency* [emphasis supplied] of the regulations was to suppress competition between the states. Being transparently protectionist the regulations were thus outside the domain of state power.

Dean Milk Company v. *City of Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951) sustained commerce clause objections to regional protectionism. An ordinance of Madison, Wisconsin, provided that milk sold in the city must be bottled within five miles of the center of the city.

Second, milk originating beyond a twenty five mile radius of Madison's customary inspections were likewise barred. This Court invalidated the ordinance as being an undue burden on commerce. First, the Court reasoned that the regulation wholly bars out-of-state commerce and is plainly discriminatory. Second, the Court held that valid local health interests need not be sacrificed if there were reasonable non-discriminatory alternatives available to the authorities. Among the alternatives noted were surcharges on processors for the new inspections. Mississippi's Section 11 reciprocity requirement is a more satisfactory alternative in that it satisfies local health requirements while avoiding extra charges or out-of-state inspections. *Dean Milk* further teaches that once a state recedes from a position of economic isolation with respect to its sister states it bears a lighter burden of upholding its regulations under the commerce clause.

Polar Ice Cream & C. Co. v. *Andrews*, 375 U.S. 361, 84 S.Ct. 378, 11 L.Ed.2d 389 (1964), further elaborated the force of the commerce clause on demonstrated trade barriers. The State of Florida had regulations which afforded local producers a preference in the sale of raw milk. To comply processors had to accept Florida produced milk at 61¢ per gallon up to prescribed quotas. If and only if the quota was met and domestic output was fully purchased could distributors sell the cheaper out-of-state milk. Against this background, this Court held that out-of-state milk was relegated to the surplus market alone. Such a scheme was said to be analogous to the New York statutes in *Baldwin*. To arguments that Polar was engaging in destructive competition, this Court answered:

> "the state may not, in the sole interest on promoting the economic welfare of its dairy farmers, insulate the Florida Milk industry from competition from other states."

This Court also looked to the total effect upon commerce. Florida's authorities argued that competition was unrestricted on the distributors' level. In footnote 11, 375 U.S. at 378, 11 L.Ed.2d at 389, the Court surveyed the volume of interstate distribution and found that Florida had the lowest volume of interstate distribution of all neighboring states. Similar inquiry into Mississippi regulation shows that thirteen out-of-state dairies freely import milk under Section 11.

The discriminatory regulations in these cases, touching price, quantity, and area discrimination, were unequivocal. A willing producer could not surmount them by meeting other standards. There was no safety valve such as the Mississippi scheme here at issue.[1] These standards are

---

1. The A & P milk produced at Kentwood, Louisiana, is technically eligible for shipment to Mississippi if it meets the health regulations applicable to domestic producers. Compliance with such standards would, of course, have to come about by means of out-of-state inspections of Louisiana dairies and processing plants by Mississippi authorities. Such inspections are not presently being conducted. Mr. Clinton Van Devender, Mississippi's Supervisor of Milk Sanitation Control, testified that he did not know whether milk processed in A & P's Kentwood plant met the State Board of Health's minimum standards for domestic producers: "We wouldn't know, because we have no cause as to whether they would or not." When asked to explain, he stated, "We haven't made any inspections of the plant or of the dairies involved in the milk supply. . . ." [p. 3, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

Mr. Van Devender also explained the relationship between reciprocity and out-of-state inspections:

> "Q. And without a reciprocity agreement then you would have to make an inspection of that milk at their plant or a plant of a producer and the originating plant?
> A. Yes, sir, and the producers.
> Q. So it would necessitate your having to enforce in the other states to do those things?
> A. Yes, sir.
> Q. What is the primary purpose in having the reciprocity agreement?
> A. To prevent the necessity of going into those states and making inspections and being assured that they meet our standards." [pp. 6-7, Testimony of Clinton Van Devender, Exhibit F, *Original Stipulation*]

(Continued on following page)

justifiable in the interest of the public, and the means for their enforcement are reasonably necessary for the accomplishment of a proper purpose, namely, safe and wholesome milk. *Lawton* v. *Steel*, 152 U.S. 133, 14 S.Ct. 499, 38 L.Ed. 385 (1894).

Mississippi's milk sanitation and health requirements for domestic producers were and are applicable to out-of-state processors without a §11 reciprocity agreement. The milk produced by the Great A & P Tea Company of Louisiana falls short of those requirements. Had §11 never been passed, the State of Mississippi could, in conformity with the commerce clause of the Constitution, take whatever steps were necessary to enforce these exacting requirements. Mississippi could levy a non-discriminatory excise tax upon out-of-state producers sufficient to defray the cost of additional inspections for trans-shipped milk. It could also require that on-site out-of-state inspections be conducted by its own inspectors as a prerequisite to entry to Mississippi markets. *Dixie Dairy Co.* v. *City of Chicago*, 355 Supp. 1351 (N.D. Ill., 1973).

Footnote Continued—

A & P has not alleged or proved that the milk at the Kentwood plant meets all standards applicable to domestic producers. While one might draw the inference from the supplemental stipulation that such might be the case, the important point is that without reciprocity, Mississippi must make the determination of qualification itself, just as it does for domestic dairies. Acceptance of reciprocal inspections and inspection standards allows Mississippi to credit both what Louisiana officials and the U. S. Department of Public Health report about the Kentwood plant instead of making continuing on-site inspections.

Without on-site Mississippi inspections and absent proof that Louisiana's milk meets Mississippi's domestic standards, the primary hurdle which A & P must cross is the more stringent standards of the State of Mississippi. This could come about only by the requisite inspections in Louisiana by Mississippi officials. Mr. Van Devender's testimony indicates that expense would be the primary factor inhibiting such out-of-state inspections. Of course, Louisiana would have to permit such inspections, as would the producer involved.

Both these devices, reasonably applied, would not offend the commerce clause. As a third alternative, Mississippi has opted for a reciprocal inspection system which obviates the financial burden of inspections or taxes. If the State of Mississippi could do the former it seems on principle entirely valid that she do the latter.

Appellants treat this matter as if the effect of §11 on them proves *per se* a commerce clause violation. This proves vastly too much. Viable regulations like §11 must have some sanctions. Appellant A & P focuses sharply on its plight without appreciating the intended and actual effect of §11—the widest possible free trade consistent with preservation of local health and safety interests.

This Court's leading cases on self-executing effect of the commerce clause, *Parker* v. *Brown*, 317 U.S. 341, 633 S.Ct. 307, 87 L.Ed. 315 (1943); *Southern Pacific Company* v. *Arizona ex rel. Sullivan*, 325 U.S. 761, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *South Carolina Highway Department* v. *Barnwell*, 303 U.S. 177, 58 S.Ct. 510, 83 L.Ed. 1124 (1938), all take an empirical view of challenged regulations. These decisions analyze the rationale for the regulation, its actual effect, and its effects on interstate commerce both on the parties and those similarly affected. The commerce clause as seen through these decisions, mandates an appraisal and accommodation of the competing demands of state and national interest involved, not total erosion of state regulation of commerce.

A & P asks this Court to void a statutory regulation producing pure free trade merely because of Louisiana's actions, not because of anything the State of Mississippi has done. This is redress against the wrong party for the wrong reasons. Given the relevant facts and circum-

stances: (1) widely different state regulations governing all the minutiae of milk production, (2) the cumbersome nature and expense of out-of-state inspections, (3) lack of central facilities to inspect out-of-state milk while in transport, Mississippi's policies appear in a more favorable light. That the regulation is coercive on participating states is a testament to its effectiveness. If §11 were voluntary it would produce no meaningful increase in interstate trade in milk. Therefore the crucial question is whether §11's effectiveness in fulfilling permissible state purposes is outweighed by a corresponding impediment to interstate commerce, Id. at 325 U.S. 775, 776. Here the balance is doubly struck in favor of the state regulation. By the least expensive and least disruptive method, §11 has produced an impressive volume of interstate movement of processed milk.

Further there is strong economic justification for §11. As a leading commentator has observed:

> "How overreaching must a state measure to merit condemnation as discriminatory . . . Discrimination exists or not depending upon whether there is an economic justification for the difference in treatment which the state accords interstate commerce." Noel T. Dowling, "Interstate Commerce and State Power—Revised Version," *Selected Essays on Constitutional Law*, 1938-1962, 280, 290.

Of course our obvious and repeated theme is that §11 has generated a wide free trade area in milk. As a consequence §11 has produced an attendant freedom from state government regulation as milk moves interstate. Bypassing of each state's inspection machinery removes a large hidden cost of milk production. Under §11 producers obviously may skirt potential excise taxes, inspection fees,

as well as delivery delays and resultant risk of spoilage. Finally, all producers benefit economically by saving production cost increases required to meet more stringent out-of-state standards. Also conserved is any effort to produce milk in the same plant according to different states' standards.

Section 11 clearly meets the balancing test this Court has ordained in commerce cases. The burden imposed by §11 is clearly not excessive in relation to the putative local interests. *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). Where §11 clearly produces far-ranging free trade in milk with respect to other sister states, this Court cannot say that the regulation serves provincial local interests. The focus clearly should be on interstate commerce in milk through Mississippi with respect to all sister states and not the business interests of the Great A & P Tea Company of Louisiana, which set up its Kentwood processing facility in either disregard of or ignorance of applicable Mississippi regulations.

Mississippi's §11 regulation is a reasonably nondiscriminatory alternative to barriers that would result from application from Mississippi's own domestic requirements to foreign producers. There is no purer example of such barriers than Dr. Vidrine's explanation of Louisiana's trade barrier in milk. §11 is a proper regulatory bypass of strict adherence by each state to its own exacting standards. In exactly the way envisioned by *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 71 S.Ct. 295, 95 L.Ed. 329 (1951), Mississippi has opted for accepting substantially equivalent regulations of a sister state rather than charging the actual and reasonable cost of out-of-state inspections to importing producers. *Dean Milk, supra*, approved this approach, and Mississippi has accepted the invitation with the proviso the

forwarding state accept Mississippi ratings and equality of Mississippi's regulations.

The additional requirement of reciprocity is consistent with *Dean Milk* and its family of cases. The practical effect of Mississippi's regulation is one which satisfies this Court's standards for a justifiable indirect burden upon commerce. First, Mississippi has opened its borders by its policies and has not "placed itself in a position of economic isolation." *Baldwin* v. *Seelig, Inc.*, 294 U.S. 511, 55 S.Ct 497, 79 L.Ed. 1032. Second, in dealing with a commodity like milk, Mississippi has conditioned importation upon "fitting standards of sanitation. . . ." Those fitting standards are to waive its own strict requirements and replace them with a regime under which believable sister state inspections and inspection ratings up to 90 percent of the federal standard are enough if the forwarding state will agree to reciprocate.

Reciprocity, as conceived and operated by Mississippi health authorities, preserves both free trade in milk and protection of the health and safety of the state's inhabitants. Through reciprocity a minimum of indirect interference with interstate commerce results. As in the case of Louisiana, Mississippi's policy only results in an obstruction of trade where a sister state adopts avowedly nonstatutory and unconstitutional policies to protect local dairies. While Louisiana is not a party defendant, this Court cannot overlook Louisiana's stubborn policies as Court balances the effect upon all commerce.

With mutual exchanges of standards of inspection under §11, Mississippi does not appreciably burden interstate trade. Such incidental or indirect burden as that which afflicts A & P, *Milk Control Board* v. *Eisenberg Farm Products*, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752, does not

appreciably burden interstate trade. Interstate commerce in milk is a two-way street. Mississippi's regulations presuppose that foreign states will accept her milk, and §11 provides a basis for that acceptance.

Mississippi's policy cannot be judged by the interruption which a foreign state's recalcitrance produces. In other words, but for Louisiana's policy, Mississippi's regulation would serve valid health purposes and valid relaxed regulatory requirements. But Louisiana's obstinate policies jam the interstate machinery.

Appellant argues access to interstate commerce cannot be conditioned upon the action of some other state. This Court's authority is to the contrary. In *Mintz* v. *Baldwin*, 289 U.S. 346, 53 S.Ct. 611, 77 L.Ed. 1245 (1933), the State of New York required that every interstate shipment of livestock be accompanied by a certificate from the sending state's chief sanitary officer that the cattle and their herds were free from Bangs disease. The Court held that the order was an appropriate inspection measure to prevent further spread of disease. This Court implicitly ruled that the rights of private parties might hinge upon the actions or inaction of government bodies. Of course, A & P could have had redress in the State or Federal Courts against Louisiana officials both for commerce clause reasons as well as grounds under the applicable Louisiana health statutes. If A & P is being prejudiced by the actions of Louisiana health officials it should direct its complaints there.

II. This Court Lacks 28 USC §1253 Jurisdiction of the Appeal Concerning Those Out-of-State Processors Who Were Grandfathered in When §11 Was Adopted; the Order Appealed From, Properly Considered, Does Not Deny an Injunction Concerning a Specific State Statute or Regulation Concerning Grandfathered Dairies; Alternatively, There Is No Jurisdiction Because A & P Has No Standing to Challenge the Shipping of Milk by Other Out-of-State Dairies.

The presence of any issue concerning access to Mississippi markets by other out-of-state processors is a mystery. The original complaint for a declaratory judgment and injunctive relief does not raise the issue. No amended pleading does so. The grandfather clause treatment did not relate to §11, the only statute or regulation under attack. No relief was asked concerning any previous statute or regulation in existence before §11 which might have provided authority for other dairies to enter, nor was any such statute adduced by appellant. Yet, A & P in the "Questions Presented" portion of its jurisdictional statement states as follows:

> "A related question is whether Mississippi enforcement policy, allowing certain Louisiana milk processors to export into Mississippi but denying that right to A & P unconstitutionally deprives A & P of the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution." [Jurisdictional Statement, p. 4]

This issue was injected into the case quite by accident. At the hearing on motion for preliminary injunction on November 6, 1972, counsel for the appellee Dr. Cottrell introduced a document showing those dairies who were shipping under §11 reciprocal agreements. [Exhibit F, p.

10, *Original Stipulation*] The document containing this information also showed that four dairies in Louisiana and two in Alabama were grandfathered into the state at the time §11 was adopted. A & P did not further explore the issue.

One year elapsed between the November 6, 1972, hearing and the hearing on merits. A & P, having learned of the access to Mississippi by other Louisiana dairies, filed no amended pleading and undertook no further discovery. In fact, it is quite clear that the only use A & P made of these grandfather clause regulations was to argue in the Trial Court, as they did in their jurisdictional statement (Jurisdictional Statement, p. 5) that A & P met all the health related requirements Mississippi imposed because certain other out-of-state dairies which were not inspected could ship into Mississippi. Of course, this reasoning pales before the explanation that A & P is barred not by the §11 health standards but by the standards applicable to domestic producers. *Supra*, p. 5. But as far as the pleadings, testimony, and stipulations are concerned, there is no factual development by A & P of the policies and practices underlying these grandfather regulations or their source in state law.

A & P has not sought to learn under what regulations or policies the grandfathered in dairies who have shipped into Mississippi before 1967 were continued. That, of course, bears materially upon whether they have sought an injunction against a state statute or regulation of state-wide import by reason of its unconstitutionality or whether such an injunction has been denied under 28 USC §2281. The only record fact which even tangentially bears upon the grandfather regulations is that no inspections are presently conducted outside Mississippi. It does not appear of record

what health standards are applied to these grandfathered in dairies, or under what regulation they were admitted. There is no record on whether any reciprocal arrangements were a part of these grandfather clause regulations. As to Louisiana, it is clear that reciprocity was no part of the grandfathered in dairies since Mississippi processed milk cannot enter Louisiana. (Testimony of Clinton Van Devender, p. 7, Exhibit F, *Original Stipulation*) Finally, it is not shown that access under the grandfather clause is necessarily statewide access. In other words, the grandfathered regulations may have granted access to certain counties, not the whole state.

On this state of facts, the District Court treated the incipient claim against the grandfather clause regulations as a substantive claim for relief. *Great Atlantic & Pacific Tea Co.* v. *Cottrell, supra,* p. 576. The Court held the rule did not violate equal protection. Conceding that the reciprocal agreement feature of §11 was valid, the court felt enjoining it because of the grandfather clause regulations would have barred the imposition of a valid reciprocity policy at any time in the future to any dairies in states where some dairies had been grandfathered in. A & P simply could not have through the back door what it could not obtain through the front.

At a minimum this Court lacks jurisdiction of the appeal over the issue of grandfather clause regulations. Whether this is a 28 USC §1253 appeal depends, in turn, on whether a Three Judge Court was properly convoked to hear that issue. *Moody* v. *Flowers,* 387 U.S. 97, 87 S.Ct.

1544, 18 L.Ed.2d 643 (1967).[2] At the outset the equal protection claim concerning the grandfather clause regulations was not properly before the Three Judge Court. It was clear that the grandfather clause processors did not enter the state by virtue of or under the auspices of §11. A different and previous regulation or policy was the source. This is clear from the very language of §11. No statute or regulation embodying the grandfather clause policy was before the Court. Given the void in the evidence concerning the source or application of the grandfather clause regulations sustaining a §1253 appeal concerning it would be to take jurisdiction where none affirmatively appears.

One cannot tell from the pleadings, the opinion of the Court, or the jurisdictional statement exactly the relief A & P wants concerning the grandfather clause. If they are attacking the grandfather clause policy it would appear that an injunction would merely bar enforcement of that policy further. This would strip the grandfathered in dairies of their access but would not affirmatively benefit A & P. In that posture any jurisdiction of such a claim

---

2.

§2281. Injunction against enforcement of State statute; three-judge court required

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

§1253. Direct appeals from decisions of three-judge courts

Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

would fail, since A & P has no direct interest in merely disadvantaging its competitors without obtaining any affirmative benefit for itself. *Golden* v. *Zwickler*, 394 U.S. 103, 110, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Couched in that way the requested relief would not obtain any protection for A & P against actual interference with their rights. *United Public Workers of America* v. *Mitchum*, 330 U.S. 75, 67 S.Ct. 556, 91 L.Ed. 754 (1947). If proscription of the grandfather policy is at issue, A & P is clearly before this Court urging someone else's lawsuit. To take access by means of interstate commerce away from competitors places A & P in the position of urging less constitutional protection for everyone. It does not undo allegedly unconstitutional conduct with respect to A & P.

To the contrary, if A & P is suggesting that it is entitled to a mandatory injunction to obtain entry for her milk because of the claimed equal protection violation as to the grandfathered dairies theory, then it is not challenging §11 as to constitutionality. §11 says not a word about grandfathered dairies. Such dairies as were grandfathered were continued in existence under predecessor regulations, not §11. Hence, there is no Three Judge case. *Public Service Commission* v. *Wycoff*, 344 U.S. 237, 73 S.Ct. 236, 97 L.Ed. 291 (1952); *Bailey* v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962).

A Three Judge case and a proper §1253 appeal also are lacking on A & P's assertion that the grandfather treatment is nonstatutory and therefore ultra vires. At page 12 of the Jurisdictional Statement, A & P says "At no time has Mississippi proffered any state legislative act to permit such grandfather treatment." This says that the policy is followed without statutory approval and, therefore, the attack on it cannot be a challenge to the constitutionality of a state statute. Note that the appellant does not say that

the grandfather regulation takes place under a state legislative enactment but rather exceeds any statutory authority. *Frasier* v. *Board of Trustees of University of North Carolina*, (D.C. of N.C., 1955) 134 F.Supp. 589, aff'd without op. 350 U.S. 979, 76 S.Ct. 467, 100 L.Ed. 848 (1956). A & P affirmatively says that there is no such statute. Therefore, A & P's claim against the grandfather policy does not attack a state statute or policy thereunder. *Phillips* v. *U. S.*, 312 U.S. 246, 61 S.Ct. 480, 85 L.Ed. 800 (1941); *Moody* v. *Flowers, supra.*

The order denying A & P relief on its equal protection claim is not an order denying an injunction against a state statute. A & P did not seek an injunction against the enforcement of the grandfather policy so much as they appear to be asking the Court, for the first time on the appellate level, to mandamus the state authorities to grant A & P the same privileges as the grandfathered in dairies. Since a prohibitory injunction would not have availed A & P of any benefits, the Three Judge Court's resulting decision against A & P is in the nature of a declaratory judgment. A & P did include in its original prayer for relief a prayer for a declaratory judgment that Mississippi's policy under §11 violated the commerce clause.

On the extravagant assumption that this Court might treat the grandfather policy as intrinsically related and ancillary to the Three Judge issue, the District Court's holding on the equal protection question is in the nature of a declaratory judgment which is not directly appealable pursuant to §1253. *Rockefeller* v. *Catholic Medical Center*, 397 U.S. 820, 90 S.Ct. 1517, 25 L.Ed.2d 806 (1970). Since a favorable decision for A & P on the equal protection claim could not have granted them access to Mississippi markets, by the same token the District Court's unfavor-

able ruling did not deny them coercive relief. This makes the matter nonappealable under 28 USC §1253.

Finally, there is no warrant for considering the equal protection claim, as pendent to the §11 claim. *Perez* v. *Ledesma*, 401 U.S. 87, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971). The equal protection claim turns on different facts, questions different regulations, though they are not identified, and does not require relief of a constitutional nature. There are clearly two claims—one against the enforcement of §11 turning on a constitutional challenge grounded in the commerce clause and another against pre-§11 grandfather treatment for dairies importing milk as of the date §11 was adopted. The relief as to the §11 claim would strike down enforcement of a state policy; relief on the equal protection claim if it were to be effective relief, would mandatorily add to a pre-existing state policy. As *Ledesma* ruled, "Even where a Three Judge Court is convened to consider one controversy between two parties, the parties are not necessarily entitled to a Three Judge Court and a direct appeal on other controversies which may exist between them." *Perez, supra*, 401 U.S. at 87, 88, 27 L.Ed.2d at 706.

CONCLUSION

§11 of Mississippi's milk regulations enhance the flow of interstate traffic in milk through Mississippi. The effect of a comprehensive reciprocity provision such as §11 should not be judged solely by whether the most economically isolated states cooperate with it. The State of Louisiana is by the plain admission of its state health officer [Original Stipulation, Exhibit 2] barring free trade in processed milk without any justification whatsoever. Should this case be reversed, this Court's ruling will not

budge Louisiana and its officials from their obstructionist policies. By the same token, a reversal might invite those states extending reciprocal provisions to out of state dairies to abandon those policies in favor of license fees or strict enforcement of domestic regulations.

Therefore, this judgment of the District Court should be affirmed for the following reasons:

1. The admittedly unconstitutional policy of the State of Louisiana is really the clog upon the interstate shipment of milk in this case.

2. An overview of the application of Mississippi's policies shows they were enacted to further and have actually furthered the broadest possible free trade in milk.

3. The barrier inflicted upon Louisiana milk is necessary to implement the free trade policies of §11 since all participating states must simultaneously make good faith undertakings to create free trade in milk.

4. Such barrier as results for producers in Louisiana results from the imposition of valid health and safety requirements of the State of Mississippi, which apply when no reciprocity agreement is in force.

This Court lacks jurisdiction to hear A & P's claim that it is denied equal protection of the laws by access to the Mississippi milk market of certain processors enjoying grandfather clause exemptions from §11. Regardless of the merit of such claim, Section 1253 jurisdiction is strictly construed. Upon this premise, A & P cannot raise in this Court, under Section 1253, the validity of grandfather clause policies since it has neither pled nor proven the source of such policies in state law. Nor has A & P asked for an injunction within the contemplation of Section 1253. The

equal protection claim, if there be one stated, belongs in the Court of Appeals.

Appellee submits that the judgment of the District Court denying all relief should be affirmed.

Respectfully submitted,

A. F. SUMMER
Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

HUGO NEWCOMB
Assistant Attorney General
State of Mississippi
Post Office Box 220
Jackson, Mississippi 39205

HEBER LADNER, JR.
Special Counsel
Suite 1638, Capital Towers
Jackson, Mississippi 39205

By: HEBER LADNER, JR.